Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

JOHN A. BALDI AND
ELSIE M. BALDI,

Petitioners,

v.

HENRY J. FARRIN; LAURENCE D. YEATON;
JOHN D. HICKEY; PETER P. BOSIAK; TOWN OF EPSOM,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the First Circuit erred in holding that a physical takings claim is not ripe for adjudication by the Federal District Court, without first exhausting State law remedies, as set forth in the two prong test established by the United States Supreme Court for regulatory takings, in the case of Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S.Ct. 3108 (1985).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Respondent Town of Epsom, is incorporated as a town in the state of New Hampshire, and there is no publicly traded stock.

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OPINIONS BELOW

The December 23, 2002 Judgment of the United States Court of Appeals for the First Circuit is reprinted at App. 1a - 3a. The Order of the United States District Court for the District of New Hampshire, dated March 18, 2002, is reprinted at App. 4a - 7a and the District Courts Order of September 24, 2001 follows at App. 8a - 21a.

STATEMENT OF JURISDICTION

The First Circuit issued its Judgment on December 23, 2002. On Mach 6, 2003, prior to expiration of 90 days from the First Circuit's issuance of Judgment, counsel for the Petitioners mailed "Appellants' Application To Extend Time To File A Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit", to the Supreme Court. On March 11, 2003 Justice Souter, extended the time "to and including May 7, 2003".

STATUTORY PROVISIONS INVOLVED

This case involves a cause of action brought under title 42 U.S.C. § 1983 for violation of property rights granted to the petitioners, by the takings clause of the 5th and 14th Amendments of the United States Constitution.

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The 5th Amendment to the Constitution provides:

No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The 14th Amendment to the Constitution, Section 1., provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

New Hampshire Revised Statutes Annotated, RSA 231:141 provides:

It shall be the duty of the tree warden to examine the trees growing within the limits of highways and to designate from time to time such as may be reasonably necessary for the purpose of shade or ornamentation and to aquire them in the name of the municipality as hereinafter provided, if such can be done, either by gift or by purchase if at a fair price and funds either public or private are available. Failing in this, he may take said trees, including the right to maintain the same as shade trees, for the use of the town or city by appraising the fair value of the same and by causing to be served upon the owner thereof a notice of such taking, which notice shall state the number of each variety of tree so taken, the location of the same as near as practicable, and the value thereof as fixed by him, or by a committee selected for the purpose, and also by filing a copy of such notice as attested by him with the town clerk. If the owner shall be satisfied with the value stated in such notice, the tree warden shall cause the same to be paid to him forthwith. If the owner shall be dissatisfied, he may within 30 days after said notice has been served upon him, but not afterwards, apply to the selectmen to access his damages. Such proceedings shall thereupon be had, including the right to appeal, as are provided in the case of assessment of damages in laying out of highways by selectmen; and thereupon such damages, if any, may be awarded as shall be legally and justly due to the landowner.

New Hampshire Revised Statutes Annotated, RSA 231:150 provides:

Mayors of cities, selectmen of towns and county commissioners for unorganized places shall annually,

and at other times when advisable, cause to be cut and disposed of from within the limits of town maintained highways all trees and bushes that may cause damage or pose a safety hazard to such highways or to the traveling public; provided however that no tree which has a circumference of 15 inches or more at a point 4 feet from the ground shall be removed in the absence of notice to the abutter in the same manner as provided in RSA 231:145 and 231:146, except when the delay entailed by such notice would pose an imminent threat to safety or property. Shade and fruit trees that have been set out or marked by the abutting landowners or by the town tree wardens, and young trees standing at a proper distance from the highway and each other, shall be preserved, as well as banks and hedges that serve as protection of the highway, or that add beauty to the roadside.

STATEMENT OF THE CASE

I. Overview of the Case

The First Circuit, when faced for the first time with the question of whether a physical taking is ripe for adjudication without exhausting State remedies, chose to affirm the ruling of the District Court. Finding that there is no distinction between the Supreme Courts decision in Williamson, a regulatory taking, and a physical taking as experienced by the petitioners. App. 3a.

II. Background of the Case

The petitioners are the owners of real property in the town of Epsom, that was cleared and established as a working

farm in or about 17 40.[1] At a later date a colonial easement road was established, that passes through the property.[2] The sides of the roadway where it passes through the petitioners property, is lined with maple trees owned by them, that were planted evenly spaced on both sides of the roadway, approximately one hundred and fifty years ago. Some of the trees exceed six feet in circumference.

The property holds two buildings approximately two hundred years old, a dwelling house with an attached barn/garage type structure exceeding forty (40) feet in length. An asphalt drive leads to the roadway from the attached structure. The petitioners have owned the property continuously since 1959. In August of 2000, the town's road agent, chief of police and three other individuals, came to the property without notice and while the petitioners were not

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[1] In highways laid out through the lands of individuals in pursuance of statutes, the public has only an easement, a right of passage; the soil and freehold remain in the individual whose lands have been taken for that purpose. Amasa Makepeace v. Henry Worden, et al., 1 N.H. 16 (1816)

[2] The acts of the provincial legislature (3 N.H. Laws 338, 351) in pursuance of which the Province Road was laid out about 1770 manifests an intention to take no more than was necessary for suitable travel and the title to the soil remained in the abutting owners for any purpose not inconsistent with the public travel.

In such cases the abutters rights to the soil extend to the thread of the public way and the trees growing thereon belong to him.

In such cases the public cannot take the trees except for public use and upon payment of just compensation. Laconia v. Joseph J. Morin, 92 N.H. 314 (1943).

present and dug a trench parallel to the roadway, on both sides of the roadway, in excess of 1 foot deep and 2 feet wide. In doing so the asphalt drive to the petitioner's garage was breached, denying access by vehicle to the garage and dwelling house. The trench also has denied the petitioners access to the hay field on the south side of the roadway by means of an entryway that was over 250 years old. All the trenching was done on property owned by the petitioners, and theirs was the only property trenched.

The material excavated was top soil, which was taken by the town and used as such, in an expansion of the local (town owned) cemetery. In addition, the parties doing the road work bulldozed off the roots of the ancient maple trees that were between the asphalt surface of the road and the trucks of the trees. This has stressed the ancient trees and is causing them to die.

Prior to the acts done in August of 2000, the road agent for the town asked for and was denied, permission to install a culvert to drain road surface water to a collection point he sought to install on the petitioners property on the south side of the road, and then pass the water through a drainage culvert to be installed under the road, exiting and depositing all the drainage water on the plaintiff's property on the north side of the road. Despite being denied permission, the road agent came to the property when the petitioners were not home and installed the collection point and drainage culvert anyway. Discharge from the culvert has eroded and collapsed the embankment on the north side of the road, petitioner's property, and deposited all the sediment into their man made pond.

Petitioners, in writing and orally, asked the town to either repair the damages and remove the culvert or pay just

compensation. The town refused and the petitioners filed suit pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of New Hampshire. Their complaint alleged three federal counts: Eminent Domain Taking Without Just Compensation; Eminent Domain Taking Without Due Process; Denial of Equal Protection; and several State law counts pursuant to 28 U.S.C. § 1367 which confers supplemental jurisdiction on the Federal District Courts.

III. Proceedings Below

The parties filed motions for summary judgment with the District Court, and on September 24, 2001 the court issued an order denying summary judgment and declining its right to exercise supplemental jurisdiction. App. 20a The petitioners State law claims were dismissed without prejudice and the petitioners then re-filed those claims in State court.

The parties re-filed motions for summary judgment on the three federal counts. On March 18, 2002 the district court held that the Supreme Courts ruling in Williamson applied to physical takings as well as regulatory takings, and that petitioners had not satisfied the exhaustion requirement of Williamson. App. 6a. The case was then dismissed without prejudice as to the three federal counts due to lack of subject matter jurisdiction.

Finding no case law on the issue within the circuit, the petitioners appealed the District Court's ruling to the First Circuit Court of Appeals. Stating that they had not yet faced this precise question, the three judges sitting on the matter issued a judgment affirming the District Court's dismissal of petitioner's claim as not yet ripe. App. 3a.

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 identifies considerations used by the Court in deciding whether to exercise its discretion to grant a petition for writ of certiorari. One consideration is that a "United States court of appeals has decided an important question of federal law . . . that conflicts with relevant decisions of this Court." Another consideration is that a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . . ." Finally, the Court considers whether the court of appeals decision "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this courts supervisory power . . ."

Two of these considerations are present in this case.[3] Throughout the history of the Republic this Court has consistently ruled that permanent physical occupation of private property by governmental action is a taking and involves the application of per se rules.[4] At no time has the Court ever applied the two prong test required in a regulatory taking to the physical occupation of private property. In the First Circuit decision, all of the cases cited in their decision involve regulatory takings. App. 2a-2b. This was done because the important question of Federal law as to whether the exhaustion requirement applies to physical occupations,

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[3] When the Court ruled in Loretto (1982), a physical occupation, it did not mandate the ripeness test first construed in Agins (1980), a regulatory taking.

[4] In Tahoe-Sierra (2002), the Court specifically stated physical takings precedents are not applicable to regulatory takings cases, and vice versa.

had not been definitively answered by this Court. In addition, the ruling of the First Circuit and the other appellate court decisions cited in its decision, greatly depart from the previous rulings of this court in physical occupation cases where immediate adjudication in a Federal Court has always been allowed. Without review by the Court, those courts of appeal who have not yet had reason to rule on the question will be without precedent from the nation's highest Court and the issue will be decided solely on appellate court rulings.

For all these reasons the Court's review is warranted.

I. Review Is Warranted Because The Supreme Court Has Never Expressed Its Opinion as to Whether Exhaustion of State Remedies is Required by a Plaintiff in Physical Takings Cases as Well as Regulatory Takings Cases.

The right to just compensation for governmental taking of private property originates in the 5th Amendment of the Constitution and becomes applicable to the States through the 14th Amendment. In deciding a takings case "the text of the Fifth Amendment provides a basis for drawing a distinction between physical takings and regulatory takings." Tahoe-Sierra, 122 S.Ct. at 1478. This confirms the Courts previous holding that "the Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. at194. In those cases where "the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." U.S. v. Pewee Coal Co., 341 U.S. at 115.

With the advent of regulatory takings claims through inverse condemnation, the Court in 1980 began applying a ripeness test starting with Agins v. City of Tiburon, 447 U.S. 255 and more definitively doing so in the above cited Williamson case. Although the Court has recently held it to be "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a regulatory taking, and vice versa", Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. at 1479, the First Circuit did so in its decision of 12/23/02. App. 1a-3a. All of the cases cited were regulatory takings as opposed to the petitioner's physical takings claim. The District Court agreed with the petitioners that the issue in the present case was a physical taking, but it applied the regulatory taking precedent set forth in Williamson as grounds for a ripeness dismissal. App. 6a.

Both the First Circuit and the District Court have decided an important question of Federal law, that exhaustion of state remedies applies to physical takings, and did so by using Supreme Court precedence in a manner that this Court ruled to be improper in Tahoe-Sierra. If the decision of the First Circuit is allowed to stand, it will alter this Courts findings which "emphasized that physical invasion cases are special and have not repudiated the rule that any permanent physical occupation is a taking." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. at 432.

II. Review is Also Warranted to Eliminate Confusion in the Lower Courts, by Defining the Rules to be Applied in Physical Takings as Opposed to Regulatory Takings.

In "Williamson", the Court clearly defined a two prong test to be utilized by the lower courts in determining

whether a regulatory taking is ripe for adjudication by a federal court. Although Williamson was decided subsequent to "Loretto" which was a physical taking, the Court did not apply the exhaustion requirement in Loretto, which was decided subsequent to "Agins, the regulatory takings case in which the ripeness requirement was first defined. The Court has never ruled as to whether the exhaustion requirement set forth in Williamson is applicable to physical takings. This is most easily explained by the fact that outright physical invasions of private property by government without payment of just compensation are rare, leaving the Court little opportunity to do so. In the present case, there is a clearly defined physical invasion, without just compensation or due process, either before or after the physical invasion and both the First Circuit and the District Court have defined it as such. This presents the Court with an opportunity to rule on a matter of law that has no Supreme Court precedent. Such a ruling will serve to eliminate any confusion that might be suffered by the lower courts when trying to decide if the First Circuits decision in the present case applies as precedent, or the finding of the Court in "Tahoe-Sierra" that "makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a regulatory taking, and vice versa." Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct at 1479, is the proper precedent.

CONCLUSION

The petition for a writ of certiorari should be granted. The judgment of the First Circuit conflicts with the holdings of the Court in Loretto v. Telepromter Manhattan CATV Corp, Tahoe-Sierra Preservation Council v. Tahoe Regional Panning Agency and the long history of the Courts rulings as to physical takings. The court should reverse the decision of

the First Circuit and in their ruling provide uniform guidance to the lower courts as to whether the exhaustion requirement set forth in the Williamson case applies to physical takings as well.

Respectfully submitted,

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Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 02-1447

[Filed December 23, 2002]

JOHN A. BALDI; ELSIE M. BALDI,
Plaintiffs, Appellants,

v.

HENRY J. FARRIN, ET AL.,
Defendants, Appellees.

JUDGES: Before Campbell and Stahl, Senior Circuit Judges, and Lynch, Circuit Judge.

JUDGMENT

John Baldi and Elsie Baldi filed a complaint under 28 U.S.C. § 1983 in the United States District Court for the District of New Hampshire. They alleged that their due process rights had been violated by the Town of Epsom, which had taken their property without compensazion. The district court dismissed the complaint for lack of jurisdiction, on the ground that the claim was not ripe.

The Town performed road work that had an impact on the Baldi property. For purposes of this appeal, the Town assumes arguendo that there was a taking. The Town argues, however, that under Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), a plaintiff must pursue any adequate and available state avenues for obtaining compensation before bringing an action for violation of his constitutional rights. The Town points to the existence of certain state law provisions for obtaining adequate compensation for the alleged taking andnotes that appellants have in fact brought state compensatory proceedings now in progress.

Appellants argue that Williamson involved a regulatory rather than a physical taking and is therefore inapplicable to their situation. Several courts of appeal have rejected this reasoning. See, e.g., Daniel v. County of Santa Barbara, 288 F.3d 375, 384 (9th Cir. 2002) (claim for damages due to physical taking not ripe until available state procedures for seeking just compensation are utilized); Arnett v. Myers, 281 F.3d 552, 562 (6th Cir. 2002) (same); Forseth v. Village of Susse, 199 F.3d 363, 372 & n.12 (7th Cir. 2000) (same) ; McKenzie v. City of White Hall, 112 F.3d 313, 317 (8th Cir. 1997) (same). Cf. Kruse v. Village of Chagrin Falls, Ohio, 74 F. 3d 694 (6th Cir. 1996) (where state does not have statutory post-deprivation procedure for compensation, plaintiff need not pursue "confusing and uncertain" state remedies) . See also Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 734 (1997) (if state provides adequate procedure for seeking just compensation, property owner cannot claim violation of Just Compensation Clause until he has used the procedure and been denied just compensation).

While this court has not yet faced this precise question, our jurisprudence in this area provides no justification for reading into Williamson the distinction that appellants would have us make. See, eg. Deniz v. Municipality of Guaynabo, 285 F.3d 142 (1st Cir. 2002).

Therefore, we affirm the judgment of the district court dismissing appellants' claim as not yet ripe.

By the Court:

RICHARD CUSHING DONOVAN

Richard Cushing Donovan, Clerk.

cc: John Baldi
Nicholas J. Decoulos, Esq.
R. Matthew Cairns
Marie M. McPartlin, Esq.

certified copies: Honorable Joseph A. DiClerico and Mr. James R. Starr, U.S.D.C. Clerk

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil No. 01-098-JD

[Filed March 18, 2002]

John A. Baldi and Elsie M. Baldi	)
	)
v.	)
	)
Henry Farrin, et al.	)
	)

ORDER

The plaintiffs, John A. and Elsie M. Baldi, proceeding pro se, own property in the town of Epsom along Center Hill Road that they allege was damaged by the defendants. The defendants are the town of Epsom and several town officers. The Baldis bring civil rights claims pursuant to 42 U.S.C.A. § 1983, alleging that the effects of the town's road work along their property constituted a taking without compensation and a denial of their rights to due process and equal protection. The parties' previous motions for summary judgment were denied due to unresolved factual issues, and they have again filed motions for summary judgment.

The parties focus on the factual bases of the Baldis' claims in their motions and objections. The defendants also

argue, however, citing Blaisdell v. City of Rochester, CV-97-82-M (D.N.H. Jan. 4, 1999), that the Baldis have not claimed that state law remedies were unavailable or inadequate. Although the defendants' argument does not directly address the issue the argument raises a question as to whether the Baldis' claims are ripe. See Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186, 195 (1985). The court is obligated to resolve any question as to the ripeness of the claims in order to satisfy itself that subject matter jurisdiction exists. See, e.g., Orix Credit Alliance Inc. v. Wolf, 212 F.3d 891, 895-96 (5th Cir. 2000); R.I. Ass'n of Realtors Inc. v. Whitehouse, 199 F.3d 26, 33 (1st Cir. 1999); Am. Airlines Inc. v. Cardoza-Rodriguez, 133 F.3d 111, 115 n.1 (1st Cir. 1998).

In Williamson, the Supreme Court held that a claim premised on the Takings Clause of the Fifth Amendment is not ripe until the appropriate governmental entity has made a final decision and it is shown that the state does not provide an adequate procedure for seeking just compensation. Williamson, 473 U.S. at 186, 190. The Williamson ripeness requirements also apply to due process and equal protection claims arising out of an alleged taking. See, e.g., Williamson, 473 U.S. at 199-200; Dougherty v. Town of North Hempstead Bd. of Zoning, 2002 WL 264993 at *2-3 (2d Cir. Feb. 26, 2002) (citing cases); Arnett v. Myers, 2002 WL 242859 at *7 (6th Cir. Feb. 21, 2002); D'Ambra v. City of Providence, 21 F. Supp. 2d 106, 109-11 (D.R.I. 1998). Although Williamson arose in the context of a regulatory taking, courts also apply the ripeness requirements in the context of a physical taking claim. See Arnett, 2002 WL 242859, at *7-8; McKenzie v. City of White Hall, 112 F.3d 313, 316-17 (7th Cir. 1997) ; Forseth v. Village of Susse, 199

F.3d 363, 372 & n.12 (7th Cir. 2000). In a physical taking case, the taking usually constitutes a final decision, satisfying the first Williamson requirement but leaving the exhaustion requirement. See Arnett, 2002 WL 242859, at *8.

After the Baldis' state law claims were dismissed from this action, they brought suit in state court, against the same parties along with others, based on the same series of events as are alleged in this suit. The Baldis allege that the defendants violated their state constitutional rights and state statutes, and they seek damages pursuant to state statutes. The state action appears to be ongoing.

Given the apparent availability of state remedies for their claims, it appears to be undisputed that the Williamson exhaustion requirement has not been met in this case. The Baldis' federal claims, therefore, are not ripe. The Baldis' remaining claims, alleging that the defendants' road work constituted a taking without compensation under the Fifth Amendment and violated their rights to equal protection and due process under the Fourteenth Amendment, are dismissed without prejudice for lack of subject matter jurisdiction.

Conclusion

For the foregoing reasons, the plaintiffs' remaining claims, Counts I, II, and III, are dismissed without prejudice for lack of subject matter jurisdiction. The parties' motions for summary judgment (doc. no. 22 and 27) are denied as moot. The plaintiffs' motion for a hearing (doc. no. 29), motion for a view (doc. no. 30), and motion for notice (doc. no. 32) are also denied as moot.

The clerk of court shall enter judgment accordingly and close the case.

SO ORDERED.

/s/ _____
Joseph A. DiClerico, Jr.
United States District Judge

March 18, 2002

cc: John A. Baldi, pro se
Elsie M. Baldi, pro se
R. Matthew Cairns, Esquire

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil No. 01-098-JD
Opinion No. 2001 DNH 172

[Filed September 24, 2001]

John A. Baldi and Elsie M. Baldi	)
	)
v.	)
	)
Henry Farrin, et al.	)
	)

ORDER

The plaintiffs, John A. and Elsie M. Baldi, own property in the town of Epsom that they allege was damaged by the defendants in violation of federal and state law. The defendants are the town of Epsom and several town officers. The Baldis bring civil rights claims pursuant to 42 U.S.C.A. § 1983, alleging that work done along Center Hill Road, which runs through their property, constituted a taking of their property without compensation and without due process and a denial of equal protection. The Baldis allege similar claims under the New Hampshire Constitution and bring three claims under New Hampshire statutes. The plaintiffs and the defendants have moved for summary judgment.

Standard of Review

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment must first demonstrate the absence of a genuine issue of material fact in the record. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A material fact is one that "has the potential to change the outcome of the suit under the governing law" and a factual dispute is genuine if "the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party." Grant's Dairy-Me., LLC v. Comm'r of Me. Dep't of Agric., Food & Rural Res., 232 F.3d 8, 14 (1st Cir. 2000). All reasonable inferences and all credibility issues are resolved in favor of the nonmoving party. See Barreto-Rivera v. Medina-Vargas, 168 F.3d 42, 45 (1st Cir. 1999) .

A party opposing a properly supported motion for summary judgment must present competent evidence of record that shows a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986); Torres v. E.I. Dupont De Nemours & Co., 219 F.3d 13, 18 (1st Cir. 2000). The party with the burden of proof cannot rely on speculation or conjecture and must present "more than a mere scintilla of evidence in [his] favor." Invest Almaz v. Temple-Inland Forest Prods. Corp., 243 F.3d 57, 76 (1st Cir. 2001). An absence of evidence on a material issue weighs against the party who would bear the burden of proof at trial on that issue. See Perez v. Volvo Car Corp., 247 F.3d 303, 310 (1st

Cir. 2001). In considering cross motions for summary judgment, "the court must consider each motion separately, drawing inferences against each movant in turn." Reich v. John Alden Life Ins. Co., 126 F.3d 1, 6 (1st Cir. 1997).

Background

John and Elsie Baldi own property in Epsom, New Hampshire, that includes a house, a field used for haying, and additional acreage. A town road, Center Hill Road, passes through the Baldi property, and the property is bounded by Mountain Road on its west side. The Baldis' house and the hay field portion of their property are on opposite sides of Center Hill Road. Stonewalls run along much of the road as it traverses the Baldi property. Twelve sugar maple trees also stand along the road, six on each side of the road.

A barn or garage is attached to the house with a short driveway area in front. A driveway or private road used to access the rear of the property lies to the right of the house. A break in the stonewall on the hay field side of the property permits access from Center Hill Road into the field. There is another access to the hay field from Mountain Road.

Defendant Henry Farrin was the acting road agent for the town of Epsom during the summer and fall of 2000. He is now the chief of police in Epsom. Defendants John Hickey, Peter Bosiak, and Laurence Yeaton are Epsom selectmen.

Philip Dail served as Epsom road agent for much of the time between 1977 and 1991. Dail states in his affidavit that he is familiar with Center Hill Road as it passes through the Baldi property and that before 1977 there were ditches on

both sides of the road between the road and the stonewalls where they exist. Where there were no stonewalls, the ditches continued along the road in front of the area where the stonewalls would be if they continued. Dail also says that as road agent he cleaned and maintained pre-existing ditches and culverts in that area.

Ronald Brown, the owner and president of B & B Contractors, Inc., states in his affidavit that he has done work for the town since the mid 1970s. He states that he did ditching and culvert work on Center Hill Road in August and September of 1993, although he does not identify where on Center Hill Road, and he submits invoices for that work. Brown also states that he did road work for the town in 1998, 1999, and 2000, which included the ditching and culvert work along the Baldi property.

In 1996, the town installed or replaced a culvert under the road to drain the ditch on the south side of the road into the north side ditch, which the Baldis contend drains salt and other contaminants onto their property and into their pond. In 1999, the town installed or replaced a culvert across the access road to the field portion of the Baldis' property. The Baldis contend that the culvert is inadequate to hold the weight of vehicles and too narrow for farm equipment and continues to impede their access to the field, despite the town's attempts to repair the culvert.

The town appropriated money during the summer of 2000 for ditching projects on town roads. Defendant Henry Farrin was the road agent at that time, and he decided to have ditching done on Sanborn Hill Road, Mountain Road, Echo Valley Road, and Griffin Road. Because Center Hill Road

connects Mountain Road with Echo Valley and Griffin Roads, Farrin decided to have Center Hill Road ditched as well. The ditching and culvert work was done on Center Hill Road, which Farrin states was within the town's right of way, during the late summer and early fall of 2000.

The Baldis complained to the town that the ditching impedes their access to their property and mutilated the root systems of the sugar maple trees. In response to the Baldis' complaints, counsel for the defendants proposed, in a letter dated July 10, 2001, that the town would partially fill the ditch in the driveway in front of the garage or barn and would "shore up" the culvert or widen the access area for the field. The letter states that the town intended to do the work on August 8, 2001. The Baldis indicate that the town's efforts to remedy the situation have not been successful.

Discussion

The Baldis bring three federal constitutional claims pursuant to 42 U.S.C.A. § 1983. They allege that the town road work constituted a taking of their property without compensation and without due process in violation of the takings clause of the Fifth Amendment and the due process and equal protection clauses of the Fourteenth Amendment. In particular, they contend that the defendants have taken their property by excavating the ditches and damaging the roots of maple trees next to the road, by installing culverts which will cause water from the road to drain onto the Baldis' property and into their pond and by impeding their access to the rest of their property. They allege that they are the only town residents whose access to their property has been impeded by the town's culverts and ditches. The Baldis also allege similar

claims under the New Hampshire Constitution and bring three state statutory claims.

The Baldis and the defendants move for summary judgment. In support of their motion and in opposition to the defendants' motion, the Baldis submit photographs of the Center Hill Road area before and after the road work, the affidavit of the photographer, a copy of the deed to their property, copies of letters sent by John Baldi to the Epsom selectmen and their response, a letter from a forester about the maple trees, and an article about trees.

The Baldis also submit statements titled "affidavit," which are merely statements under oath that the information in their motion and accompanying memorandum is true and accurate to the best of their knowledge. As such, the Baldis' statements are not "made on personal knowledge," do not "set forth such facts as would be admissible in evidence," and do not "show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e). Because the defendants have not objected, however, they have waived any challenge to the admissibility of the "affidavits" in this context. See Perez, 247 F.3d at 314-16.

The defendants submit, in support of their motion for summary judgment and in opposition to the Baldis' motion, a copy of a subdivision plan of the Baldi property, the affidavits of Philip Dail, Henry Farrin, and Ronald Brown, copies of deeds to the Baldi property, and copies of selectmen's minutes. The Baldis have filed a motion "To Challenge the Truthfulness" of the affidavits. In their motion, the Baldis dispute the facts presented in the challenged affidavits but do not show that the affidavits fail to comply with Rule 56(e) or

that any part of the affidavits should be stricken pursuant to Federal Rule of Civil Procedure 12(f). Therefore, the motion is denied.

A. The Federal Takings Claims

"The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation." Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2457 (2001) (citation omitted). "The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use." Id. In order to implicate the Fifth Amendment protection, however, "plaintiff[s] 'must first establish an independent property right before [they] can argue that the state has taken that right without just compensation.'" P. R. Tel. Co. v. Telecomm. Regulatory Bd. of P.R., 189 F.3d 1, 16 (1st Cir. 1999) (quoting Parella v. Retirement Bd. of the R.I. Employees' Retirement Sys., 173 F.3d 46, 58 (1st Cir. 1999)).

In this case, it is undisputed that Center Hill Road is a class V town road. Although the Baldis' position is not entirely clear, it appears that they do not claim a property right to the area abutting the road where the ditches were excavated. The defendants claim, albeit with little substantiation, that the ditches are within the town's right of way and not on the Baldis' property Therefore, the property rights claimed by the Baldis, which are at issue in this case, are the maple trees along Center Hill Road, a right to unimpeded access to their property from the road, and a right

not to have drainage from the under-road culvert directed onto their property.

The defendants have not addressed the Baldis' takings claims with respect to either the maple trees or the drainage from the culvert. For their part, the Baldis have not established, as it is their burden to do, that they own the maple trees or that drainage from the culvert has been directed onto their property in violation of the takings clause of the Fifth Amendment. Since the facts relating to those claims remain in dispute and the applicable legal standards have not been addressed, summary judgment is inappropriate as to those claims.

The defendants address the Baldis' takings claims aimed at their access from the road to their property under state law.[1] The defendants appear to acknowledge that New Hampshire recognizes at least a limited property interest in the right to access the road. Since the defendants do not address whether their actions would constitute a taking under federal law, they have not demonstrated that they are entitled to summary judgment as a matter of law on that issue.

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[1] The defendants rely on New Hampshire takings claims cases, in support of their arguments on the Baldis' federal constitutional claims, apparently misunderstanding the import of the rule of decision in Webster v. Town of Candia, 2001 WL 531533 (N.H. May 21, 2001). Federal cases, not state cases, provide the governing law for federal question claims, although pertinent property rights are determined under state law. See, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982); Wigginton v. Centracchio, 205 F.3d 504, 515 & n. 15 (1st Cir. 2000); Johnson v. United States, 479 F.2d 1383, 1390 (Ct. Cl. 1973).

The Baldis mix their federal and state law claims, without distinction. Based on the record presented for summary judgment, the Baldis have not shown that they are entitled to judgment in their favor under either the Takings Clause of the Fifth Amendment or the Due Process Clause of the Fourteenth Amendment based on an alleged violation of a right to access their property from the road. See, e.g., O'Grady v. City of Montpelier, 573 F.2d 747, 750-51 (2d Cir. 1979); Johnson, 479 F.2d at 1389-90.

B. Federal Equal Protection Claim

An equal protection violation is stated, despite the lack of a suspect class, "where the plaintiff alleges that she had been intentionally treated differently from others similarly situated intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). The Baldis allege that they are the only town residents whose access to their property is being impeded by the ditches and culverts installed by the town.

In support of their claim, the Baldis submit a photograph of Center Hill Road which appears, inconclusively, to show that the ditching next to the road stops where the road changes from asphalt to gravel. The defendants confuse the Baldis' equal protection claim with their takings claims, arguing that the Baldis continue to have some access to their property despite the ditching and culverts. Since the record demonstrates and the defendants do not appear to dispute that the Baldis' access to their property has been impeded at least to some extent by the ditches and culverts, a material factual dispute remains as to whether the

Baldis have been treated differently from other town residents without a rational basis for such treatment. Summary judgment is, therefore, inappropriate on the Baldis' equal protection claim.

C. Qualified Immunity.

The defendants argue alternatively that they are entitled to qualified immunity.[2] In analyzing a qualified immunity defense, the court must first "'determine whether the plaintiff has alleged the deprivation of an actual constitutional right" and second "'determine whether that right was clearly established at the time of the alleged violation.'" Abreu-Guzman v. Ford, 241 F.3d 69, 73 (1st Cir. 2001) (quoting Wilson v. Layne, 526 U.S. 603, 609 (1999)). Only if the first two questions are answered affirmatively does the court consider whether "an objectively reasonable officer, performing discretionary functions, would have understood his or her conduct violatedthat clearly established constitutional right." Id.

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[2] The town is not entitled to claim the protection of qualified immunity. See Fletcher v. Town of Clinton, 196 F.3d 41, 55 (1st Cir. 1999). The defendants challenge the Baldis' claims against the town, as lacking the necessary allegations of municipal liability, in a footnote, without citation to pertinent authority. As such, the defendants' argument is insufficient to raise the issue of the sufficiency of the Baldis' claim of municipal liability either in support of their motion or in opposition to the Baldis' motion. See Higgins v. New Balance Shoes, 194 F.3d 254, 260 (1st Cir. 1999); United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990).

Here, the record does not permit a determination as to whether the plaintiffs have alleged a deprivation of an actual constitutional right or whether any alleged constitutional right was clearly established when the events in question occurred. Neither the Baldis nor the defendants have presented appropriate legal analysis with respect to the federal claims. Therefore, the defendants' qualified immunity defense cannot be considered on the present state of the record.

D. State Constitutional Claims

The Baldis also bring claims alleging violations of the New Hampshire Constitution, Part I, Articles 1 and 2. The Baldis have not cited any authority suggesting that the New Hampshire Supreme Court has recognized or would recognize a private right of action based upon alleged violations of the cited constitutional provisions. In contrast, the New Hampshire Supreme Court has recognized a private right of action under Part I, Article 12, of the New Hampshire Constitution, but found no right to money damages. See Rockhouse Mountain Property Owners Assoc. v. Town of Conway, 127 N.H. 593, 597-602 (1986). In the absence of a pertinent decision by the New Hampshire Supreme Court, this court is not inclined to exercise supplemental jurisdiction to decide claims that raise novel and complex state law issues. See 28 U.S.C.A. § 1367(c)(1).

Therefore, the Baldis claims under the state constitution, counts IV and V, are dismissed without prejudice for lack of jurisdiction.

E. State Statutory Claims

The Baldis allege that the defendants' road work activities entitle them to damages under N.H. Rev. Stat. Ann. § ("RSA") 231:75; pertaining to damages caused by a grade change, RSA 231:167; pertaining to damages caused by the installations of drains; and RSA 231:172, pertaining to injury to trees. The defendants again dispute the factual bases for the Baldis' claims.

Sections 231:75 and 231:167 provide a process for claiming the described damages from town selectmen. RSA 231:76 provides for appeal to the superior court. Section 231:172 prescribes a procedure for town selectmen to follow before trees may be cut or injured for installing or maintaining poles and wires.

As noted in the context of the Baldis' constitutional claims, a more fundamental problem exists with respect to the statutory claims. Nothing in any of the cited statutes suggests that the Baldis would have a private right of action in federal court based on those statutes. The parties have cited no cases, and the court has found none, in which a New Hampshire court has found a private right of action in federal court based on those statutes. In contrast, the New Hampshire Supreme Court interpreted the predecessor statutes to sections 231:75 and 231:76 to limit the statutory recovery to the process provided and not to provide a cause of action at law. See Bartlett v. Bristol, 66 N.H. 420 (1890).

The Baldis' statutory claims, like their state constitutional claims, raise novel and complex issues of state law. The court declines to exercise supplemental jurisdiction

as to those claims. See 28 U.S.C.A. § 1367(c)(1). Therefore, the statutory claims are dismissed without prejudice for lack of jurisdiction.

Conclusion

The plaintiffs' motion for summary judgment (document no. 8) is denied. The plaintiffs' motion to challenge the truthfulness of the defendants' affidavits (document no. 15) is denied. The defendants' motion for summary judgment (document no. 12) is granted as to counts IV, V, VI, VII, and VIII, which are dismissed without prejudice for lack of jurisdiction, and is otherwise denied. Since time remains for filing motions for summary judgment, the present motions are denied without prejudice to file appropriately supported motions on the remaining issues.

The parties have not articulated their positions concerning the facts and the applicable law in a sufficiently clear and detailed manner to enable the court to narrow the issues in dispute. They would be well advised to do so in the event that additional motions for summary judgment are filed. Careful attention should be paid to where the right of way in question lies, how wide it is, the nature of that right of way, what lies within it and without it, the right of the town to maintain that right of way, and the right of an abutting landowner to have access to and from the right of way.

Furthermore, the parties would also be well advised to sit down and work out their differences before further resources are expended on a federal lawsuit. At an appropriate time, the court will require the parties to mediate this matter before the magistrate judge.

SO ORDERED.

/s/ _____
Joseph A. DiClerico, Jr.
United States District Judge

September 24, 2001

cc: John A. Baldi, pro se
Elsie M. Baldi, pro se
R. Matthew Cairns, Esquire

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil No. 01-098-JD

[Filed February 8, 2002]

John A. Baldi and Elsie M. Baldi, Plaintiffs,	)
v.	)
Henry Farrin, John Hickey, Peter Bosiak, Laurence Yeaton and Town of Epsom, Defendants.	)

AFFIDAVIT OF GLORIA J. REEVES

Gloria J. Reeves says under oath and on pains and penalties of perjury:

1. I am of lawful age and have personal knowledge of the facts set forth herein.

2. I am the Executive Secretary to the Board of Selectmen in the Town of Epsom. I have worked for the Board of Selectmen for over 20 years.

3. Despite having conducted diligent searches of Town records, I have found no records which provide an accurate description of Center Hill Road, nor any records that provide information as to the layout or dedication of Center Hill Road.

4. I have found no records pertaining to the ownership, purchase or planting of maple trees along Center Hill Road.

Date: 02-08-02 /s/ _____
Gloria J. Reeves

On the date set forth above, Gloria Reeves swore that the facts set forth herein were true to the best of her knowledge and belief.

2/8/02 /s/ _____
~~Notary Public~~/Justice of the Peace

My Commission Expires April 1, 2003